FILE COPY

OCT 13 1930

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 44

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

BRIEF ON BEHALF OF THE CHICAGO AND ALTON RAILROAD COMPANY, WILLIAM W. WHEELOCK AND WILLIAM G. BIERD, RECEIVERS, CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO GREAT WESTERN RAILROAD COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, W. H. BREMNER, RECEIVER, MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY, CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY AND WABASH RAILWAY COMPANY, APPELLEES.

SILAS H. STRAWN,
P. F. GAULT,
K. F. BURGESS,
RALPH M. SHAW,
J. CARTER FORT,
G. M. SWANSTROM,
A. H. LOSSOW,
K. L. RICHMOND,
L. H. STRASSER,
FRANK H. TOWNER,
Solicitors for said Appellees.

SHEPARD-BARTLETT PRINTING COMPANY, CHICAGO.

INDEX.

Page

Statement:

References to decision of lower court and the Commission 1

Proceedings before Commission..... 2

Proceedings in lower court..... 12

Summary of Argument..... 13

Argument:

I. The action of the Commission was in accordance with the statutory power conferred upon it. The evidence introduced before it was sufficient to justify the order and the Commission was not required to establish different divisions with respect to traffic moving over different carriers north and south of the junctions..... 15

II. The order of the Commission does not operate to confiscate the property of appellants and take their properties without due process of law..... 27

III. The Commission's order is valid in so far as it undertakes to fix divisions on traffic to and from points east of the Indiana-Illinois State line..... 35

IV. Cost of service was only one of many factors to be considered in fixing the divisions in issue. There was no obligation upon the Commission to establish divisions which exactly or even approximately reflect approximate cost of transportation..... 38

V. The order is in the public interest and the Commission did not exceed its authority in making it 47

VI. The evidence before the Commission fully supports the reports and orders of the Commission..... 49

VII. The Commission made no assumptions not founded in the evidence and considered as evidence not in the record 54

VIII. The order of the Commission must be sustained since it is supported by substantial evidence and there is no irregularity in the proceedings and no error in applying rules of law..... 62

CASES CITED.

Assigned Car Cases, 274 U. S. 564.....46, 53, 63
Allen & St. L. I. M. & S. R. Co. 230 U. S. 553..... 54

Beaumont, S. L. & W. R. Co. v. U. S. 36 Fed. (2d) 789 10
Brimstone R. Co. v. U. S. 276 U. S. 104..... 22

C. M. & St. P. R. Co. v. Utilities Commission, 274 U. S. 344 32
Chicago Junction Case, 264 U. S. 258..... 46
Consolidated Southwestern Cases, 123 I. C. C. 203..... 55

Interstate Commerce Act, Section 15 (6)..... 17
Interstate Commerce Commission v. U. P. R. Co. 222 U. S. 541.....32, 53, 63
Interstate Commerce Commission v. C. B. & Q. R. Co. 186 U. S. 320..... 46
Interstate Commerce Commission v. L. & N. R. Co. 227 U. S. 88 .....46, 47, 54, 63
Interstate Commerce Commission v. Ill. Cent. R. Co. 215 U. S. 452..... 63

Minnesota Rate Cases, 230 U. S. 324..... 29

New England Divisions Case, 261 U. S. 184.....
.....12, 16, 20, 27, 49, 62
New England Divisions, 62 I. C. C. 513; 66 I. C. C. 196..18, 19
Norfolk & Western R. Co. v. Conley, 236 U. S. 605..... 29
N. P. R. Co. v. Department etc. 268 U. S. 39.....31, 58, 63
N. P. R. Co. v. North Dakota, 236 U. S. 585..... 33

Tagg Bros. v. U. S. 74 L. Ed. 287..... 40

U. S. v. Abilene & Southern R. Co. 265 U. S. 274.....
.....11, 22, 25, 34, 38, 47, 57, 61
United Railways v. West, 280 U. S. 234..... 29

Virginian Ry. Co. v. U. S. 272 U. S. 658.....46, 53, 57, 63

Western Chemical Co. v. U. S. 271 U. S. 268.....54, 63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 44

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

BRIEF ON BEHALF OF THE CHICAGO AND ALTON RAILROAD COMPANY, ET AL., APPELLEES.

STATEMENT.

MAY IT PLEASE THE COURT:

The first report of the Commission with respect to the subject matter of this suit, issued December 10, 1928, is reported at 148 I. C. C. 457, and is printed in full at pages 55 *et seq.* of the record. The second report, issued June 10, 1929, and reported at 156 I. C. C. 94, is printed in full at pages 93 *et seq.* of the record. The first order of the Commission, dated June 10, 1929, is printed in full at pages 109 *et seq.* of the record, and its second order, dated July 25, 1929, at pages 113 *et seq.* of the rec-

ord. The second order amended the second paragraph of the first order by eliminating the Texarkana & Fort Smith Railway Company as a respondent and by extending the effective date of the order from August 1, 1929, to October 1, 1929. The report of the decision in the District Court is at 36 Fed. (2d), pages 789 *et seq.* and is printed in full in the record at pages 1318 *et seq.*

The carriers on whose behalf this brief is filed were designated as Western Trunk lines and complainants in the reports of the Commission. They were respondents in the proceedings before the Commission (R. 114) and intervened as defendants in the lower court (R. 11). The statement of the proceedings before the Commission, appearing at pages 2 *et seq.* of appellants' brief is not complete, creates many false inferences and is incorrect in some respects.

The proceeding before the Commission was initiated by the Commission on its own motion by order dated October 8, 1923 (R. 1169-1170), for the purpose of determining the proper divisions of rates applying on traffic between Southwestern and Western Trunk line territories. The territories and traffic involved were further defined by order dated September 8, 1925 (pp. 3-4, appellants' brief). Twelve of the railroads named by the Commission as respondents are known as Western Trunk lines (R. 57, 58, 114) and, with the exception of the Chicago, Milwaukee, St. Paul & Pacific, are represented on this brief. Thirty-two respondents named by the Commission have their major interests in Southwestern territory and are known as Southwestern lines (R. 58, 114). Of these thirty-two Southwestern lines, only twenty-four are appellants herein, the others not having joined in this litigation.

It is inferred by appellants that in the proceedings

before the Commission, there was some insufficiency with respect to parties, but this is not so. In its first report, the Commission said (R. 57-58):

> "Complainants are principally the important lines in Western Trunk line territory that have little or no trackage in the Southwest, and defendants are principally the important lines in the Southwest that have little or no trackage in Western Trunk line territory."

Exhibit "A," attached to appellants' brief (pp. 101 *et seq.*) lists all carriers operating mileage in the two territories, but none of the Class I roads named as operating mileage in Western Trunk line territory, other than those named as respondents, have any interest whatsoever in this proceeding, or, if they have an interest, it is exceedingly slight. As a matter of fact, Petitioner's Exhibit 24, offered on the hearing in the trial court (R. 1293), shows that thirteen of them are Central Freight Association railroads, and are not Western Trunk lines at all (R. 1292).

The only other Western Trunk line Class I carriers listed in Exhibit "A" to appellants' brief are the Canadian National Railways, which is a Canadian line, the Duluth, South Shore & Atlantic and Lake Superior & Ishpeming, which are shown upon the record to be ore-carrying lines located in northern Wisconsin and Minnesota (R. 905-906), the Elgin, Joliet & Eastern, shown on the record to be a belt line around the City of Chicago (R. 906, 907), the Great Northern and Northern Pacific, which operate lines westwardly from St. Paul and Minneapolis to the Pacific coast, the Louisville & Nashville, Mobile & Ohio, and Southern, operating lines southeasterly from St. Louis, the Union Pacific, operating a line westwardly from Council Bluffs, Iowa, to the Pacific coast, the St. Joseph & Grand Island, operating a line from St. Joseph, Missouri, to Grand Island, Nebraska, and the Duluth &

Iron Range, Duluth, Missabe & Northern and Green Bay & Western, operating lines in northern Wisconsin, Michigan and Minnesota (Exh. A-56, R. 1297).

Exhibit "A," attached to appellants' brief, also shows that only eleven Class I carriers in Southwestern territory were not named as respondents. Only those shorter and less important railroads which, in order to participate in the traffic involved, must do so as part of a joint line, are omitted. The fact of the matter, so far as parties is concerned, is that every Class I carrier in both Western Trunk line and Southwestern territories, serving Kansas City and St. Louis, Missouri, and East St. Louis, Cairo, Gale and Thebes, Illinois, the junctions at which the traffic here involved is interchanged between the Western Trunk line and Southwestern carriers (R. 109), was a respondent in the proceedings before the Commission. This means that every carrier actually dividing the revenue affected by the Commission's order is a party, and that is all that is necessary. Appellants do not allege any invalidity in the Commission's order because additional respondents were not named.

It is true, as stated at page 6 of appellant's brief, that the Louisiana Railway & Navigation Co. and the Texas & Fort Smith Railway Company were not named as respondents by the Commission. The Chicago & Eastern Illinois Railway Company and the Wabash Railway Company are, however, respondents. Petitioners' Exhibit 2 (R. 1169 *et seq.*) does not include the order or orders in which these two companies were named as respondents in the proceedings before the Commission, but this exhibit does not purport to contain all of the orders made by the Commission with respect to the proceedings before it. The orders of the Commission, dated June 10, 1929 (R. 110, 111) and July 25, 1929 (R. 114-115),

name both the Chicago & Eastern Illinois Railway Company and Wabash Railway Company as respondents participating in joint rates, the divisions of which are prescribed by the orders.

Hearings were had by the Commission at Chicago, Illinois, on October 14th and 15th, and on November 16th, 17th and 18th, 1925; at Galveston, Texas, on February 3rd to 11th, inclusive, 1926; at Chicago on May 6th and 7th, 1926, and at Washington on June 28th and 29th, 1926. Two thousand one hundred and twelve pages of evidence were taken and 289 exhibits were offered and received. All the testimony, in narrative form, and some of the exhibits, are contained in the printed record, and all the exhibits were certified to this Court separately, as original exhibits (R. 1297). The record before the Commission covered a wide range, and every conceivable fact relating to the traffic involved, the rates thereon, the division of those rates, and the operation of each respondent, was proven.

The proposed report of the Examiner of the Commission, and who heard the testimony, was that no change should be made in the divisions (R. 1184 *et seq.*). Thereafter, the case was argued orally before the Commission (R. 1248 *et seq.*) and on December 10, 1928, the Commission issued its first report (R. 55 *et seq.*), in which it condemned the divisions then in effect and allowed to respondents 60 days in which to agree upon an adjustment in substantial accord with its findings (R. 90). In this report the Western Trunk lines were designated as complainants and the Southwestern lines as defendants (R. 57).

The carriers found it impossible to amicably work out the adjustment of divisions recommended by the Commission, and the Southwestern lines filed a lengthy peti-

tion for rehearing (R. 94). This petition was denied, but the Commission reconsidered the case and, on June 10, 1929, issued a second report therein (R. 93), in which it dealt in detail with each ground for rehearing urged by the Southwestern lines in their petition. On the same date it issued its first order (R. 109 *et seq.*) which was modified on July 25, 1929 (R. 113), by the elimination of the Texarkana & Fort Smith Railway Company as a named respondent.

The divisional basis prescribed in the Commission's order of June 10, 1929, will increase the divisions of the Western Trunk lines on some traffic, and increase the divisions of the Southwestern lines on other traffic. On the whole, however, the order will operate to increase the revenue of the Western Trunk lines as a group. On appellants' showing, this increase will amount to approximately $2,900,000 per year (R. 1226).

This suit was started by appellants on July 22, 1929 (R. 1), before the Commission's order became effective, and was disposed of in the lower court on September 27, 1929, by the entry of an order dismissing the petition (R. 121). An order allowing appeal was entered on November 30, 1929 (R. 135), and on the same day an order was entered staying the order of the Commission until the appeal was determined (R. 136 *et seq.*). A stay bond of $3,000,000 was required and filed (R. 138). A cross-appeal from the order staying the order of the Commission, was also taken by the United States and the Commission (R. 139 *et seq.*).

As we have said, the record made before the Commission was complete in every respect, and the two reports made by the Commission are exhaustive. They deal with all the evidence, discuss every contention and fully disclose what the Commission did and why. Appellants are

inclined to complain that during the hearings, they had no specific demand of the Western Trunk lines before them, and there is a substantial quotation from the record purporting to show the situation that existed (pp. 6 *et seq.* appellants' brief). If this were so, it would not be at all remarkable. The proceeding before the Commission was instituted upon the Commission's own motion (Section 15(6) Interstate Commerce Act, 41 Stat. 456, 486), and there was no complaint by any party. It could scarcely be said, therefore, that there was any obligation upon the Western Trunk lines to make specific demands.

The order of the Commission, dated October 8, 1923, instituting the proceeding before it (R. 1169 *et seq.*) recites that the proceeding is instituted for the purpose of determining whether or not the divisions then in effect are, or for the future will be, unjust, unreasonable or otherwise unlawful, and for the purpose of prescribing proper divisions in the event that the existing ones are shown to be improper. Surely this was sufficient advice to the Southwestern lines of the issues they were called upon to meet. Certainly, there was no obligation on the Western Trunk lines to make any definite claim.

Moreover, as appears from the quotations from the record (R. 358), shown on page 8 of appellants' brief, the Southwestern lines had knowledge, early in the hearings, that the Western Trunk lines took the position that they were not getting sufficient money in the divisions of the Southwestern rates. While appellants devote considerable space in their statement to the point that they were not advised of specific issues, they do not attack the Commission's order on that ground.

It is true, as stated by appellants (p. 9, appellants' brief) that the report of the Commission dealt with the

divisions in the aggregate, but this is due to the fact, as stated by the Commission in its first report (R. 86), that—

> "The divisions here in issue are dealt with of record on a group basis. They are, in other words, the divisions 'in the aggregate' north and south of the gateways named, and no question is raised with respect to the divisions of individual carriers."

This statement is exactly correct, for upon the hearings before the Commission both the Western Trunk lines and the Southwestern lines dealt with the divisions on a group basis. The trial court referred to this circumstance in its opinion (R. 1326, 1327), and we will hereafter demonstrate that it was so.

On page 10 of their brief, appellants state that the Commission considered statistics of Class I carriers, other than respondents in the proceedings. This is not shown to be so in either report of the Commission, although such statistics were introduced by the Southwestern lines. For example, Exhibit A-124, offered by the Southwestern lines (R. 512) includes statistics for many Western Trunk lines and Southwestern lines which were not named as respondents by the Commission. Having voluntarily offered this evidence in the hearings before the Commission, presumably because it was felt that it should be considered, appellants should not now be permitted to even infer an objection to the Commission's order because the evidence was in the record before the Commission. There is nothing to indicate, however, that it was given any weight by the Commission.

On the same page of their brief, it is said that the Commission concluded "that conditions in Southwestern territory were improving more relatively than in West-

ern Trunk line territory." What the Commission actually said was (R. 66):

> "These changed conditions have operated to change materially the relative positions of the two groups of carriers to the advantage of those serving the Southwest."

It is true, as stated on page 10 of appellants' brief, that upon the basis of a table showing density for 1922, 1923 and 1924, included by it in its report (R. 74), the Commission stated that traffic density was over 50 per cent greater in the Western Trunk line group than in the Southwest. In its first report, however, the Commission said (R. 68):

> "There can be little doubt that traffic density has increased during the past 30 years in much greater ratio in the Southwest than in western trunk line territory."

Also, in the same report, the Commission said (R. 77):

> "Statistics above described, however, have shown that general trend with respect to traffic density is more favorable to defendants than to complainants."

In their statement (pp. 11 *et seq.*, appellant's brief), considerable space is devoted to an exposition of the Commission's statements in its first report (R. 78) that the vital thing to ascertain is relative cost of service; that that cost in the Southwest was from 15 per cent to 20 per cent greater than in Western Trunk line territory (R. 78, 83), and it is alleged that under the Commission's order, appellants do not retain ton-mile earnings 20 per cent greater than those of the Western Trunk lines. This alleged discrepancy was urged upon the Commission in the petition for rehearing filed by the Southwestern lines, and with respect to it, the Commission said in its second report (R. 101, 102) that while cost of service was vital, it was required to and had taken into consideration all other factors mentioned in Section 15 (6) of the Inter-

state Commerce Act. And in the same report, the Commission said (R. 104, 105):

> "So far as relative cost of service was concerned, we did not rest content with the statement of detached facts, and a jump from them to more or less arbitrary conclusions, but we attempted to bind these facts together through statistics fairly expressive of their net results."

After a full discussion of the argument made by the Southwestern lines, the Commission further said (R. 105):

> "The final result was not the product of the statistics alone but was reached in the exercise of judgment after considering all of the pertinent evidence."

The trial court also dealt with this matter and in disposing of it said (R. 1323):

> "While the relative cost of service in the two groups was a vital thing to be ascertained, it does not follow that the solution of the Commission's problem was dependent entirely and only on this determination. Vital as this factor may have been, it does not follow that the result of the Commission's order should, in disregard of every other factor, mathematically produce a result which reflects the difference in the cost of service in the two groups. * * * The finding of the Commission as to the cost of service was simply an approximation and purported only to be such, and the Commission's report does not indicate that the difference in cost should be reflected in the distribution of revenue."

We refer to these matters in this detail, not because the assertions in appellants' brief make the facts, but so this Court will understand that both the Commission and the lower court gave full and proper consideration to every claim advanced by appellants, and not only based their conclusions upon the facts of record, but gave their reasons in full for reaching those conclusions.

At pages 21 and 22 of their brief, appellants call attention to what they term the "curious results" of the

Commission's order. It is said that the Louisiana & Arkansas Railway, Midland Valley Railroad and the Texarkana & Forth Smith Railway will not be required to pay increased divisions to the Western Trunk lines under the Commission's order, since they are not respondents, and that the Louisiana Railway & Navigation Company, Kansas, Oklahoma & Gulf Railway and Kansas City Southern Railway will be required to pay, as they are respondents. This is not a correct statement of the effect of the Commission's order.

The order only deals with the divisions north and south of Kansas City, St. Louis, East St. Louis, Cairo, Gale and Thebes (R. 109). These are the junctions upon which the divisions between the Southwestern lines and Western Trunk lines are made. The order does not relate to and does not affect the subdivisions of the revenue north and south of those junctions, nor was it necessary that it should. *U. S. & Abilene & S. Ry. Co.* 265 U. S. 274, 283. The statement in appellants' brief assumes that the order requires an increase to the Western Trunk lines on all traffic, which is not so. Sheet 3 of petitioners' Exhibit 10, introduced on the hearing in the lower court (R. 1226) and certified to this court (R. 1297), shows that on northbound oil and lumber via Kansas City, for example, the Commission's order will decrease the revenue of the Western Trunk lines.

Appellants' statement also assumes that any decrease in the earnings of the Southwestern lines will be participated in by all respondents, whereas, this depends upon the subdivision of Southwestern line's revenue, a matter not dealt with in the Commission's report. No one can correctly assume that the order of the Commission will decrease the earnings of any particular Southwestern carrier, unless those earnings accrue on traffic as to which the Western Trunk lines were given an increase,

and unless the particular Southwestern carrier is the only carrier handling the traffic in Southwestern territory.

On page 23 of their brief, appellants state that no reservation is made in the Commission's order of the right to any respondent to apply for adjustments, such as was contained in the *New England Divisions case,* 261 U. S. 184. This is incorrect. In the *New England Divisions case, supra,* this court said (p. 187) that the Commission's order was to continue in force only until further order of the Commission. In this case both the first order of the Commission (R. 109) and the second order (R. 113) contain the following language:

> "And it is further ordered that this order shall continue in force until the further order of the Commission."

This language preserves to appellants the same right of further appeal to the Commission that was given to the defendants in the *New England Divisions case, supra.*

It is also significant that of the thirty-two railroads in Southwestern territory named as respondents in the Commission's order of July 25, 1929 (R. 113), only twenty-four attacked the order of the Commission in court and now appear here as appellants. The other eight have not joined in the attack on the Commission's order and are presumably satisfied with it. Included in the list of carriers which have not attacked the Commission's order are such important lines as the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Chicago, Rock Island & Gulf Railway Company, Gulf, Colorado & Santa Fe Railway Company, and Panhandle & Santa Fe Railway Company. In this respect also, this case is similar to the *New England Divisions case, supra* (p. 188).

SUMMARY OF ARGUMENT.

I.

The action of the Commission was in accordance with the statutory power conferred upon it. The evidence introduced before it was sufficient to justify the order and the Commission was not required to establish different divisions with respect to traffic moving over different carriers north and south of the junctions.

II.

The order of the Commission does not operate to confiscate the property of appellants and to take their properties without due process of law. Confiscation in this case is not proven by a showing of rates of return alleged to be inadequate. Moreover, there was no claim made before the Commission that the property of appellants would be confiscated through an order reducing their divisions and it cannot be urged now.

III.

The Commission's order is valid in so far as it undertakes to fix divisions on traffic to and from points east of the Illinois-Indiana state line. The Eastern carriers were not necessary parties and evidence with respect to their divisions was not required.

IV.

Cost of service was only one of many factors to be considered in fixing the divisions in issue. There was no obligation upon the Commission, therefore, to establish divisions which exactly or even approximately reflect approximate differences in cost of transportation.

V.

The order is in the public interest and the Commission did not exceed its authority in making it.

VI.

The evidence introduced in the hearings before the Commission was complete and definite as it was possible for it to be. It fully supports the reports of the Commission and its orders.

VII.

The evidence before the Commission fully supports the order, and no assumptions were made by it not founded in the evidence. Nor did it consider any matters essential to a disposition of the case and which were not introduced in evidence.

VIII.

The order of the Commission is supported by substantial evidence and there was no irregularity in the proceedings before it and no error was made in the application of rules of law. Its order must, therefore, be sustained.

ARGUMENT.

I.

THE ACTION OF THE COMMISSION WAS IN ACCORDANCE WITH THE STATUTORY POWER CONFERRED UPON IT. THE EVIDENCE INTRODUCED BEFORE IT WAS SUFFICIENT TO JUSTIFY THE ORDER AND THE COMMISSION WAS NOT REQUIRED TO ESTABLISH DIFFERENT DIVISIONS WITH RESPECT TO TRAFFIC MOVING OVER DIFFERENT CARRIERS NORTH AND SOUTH OF THE JUNCTIONS.

At pages 29 to 55, inclusive, of appellants' brief, an exhaustive argument is made to support the claim that the order here assailed is invalid because it deals with the divisions in the aggregate, nroth and south of the junctions. This argument apparently does not go to the point that the record before the Commission was insufficient. The point urged seems to be that Section 15 (6) of the Interstate Commerce Act requires the Commission to consider the conditions on each individual railroad; that the Commission did not do this, its failure to do so being evidenced by the fact that its decision deals with the divisions in the aggregate, and that its order is, therefore, void. At page 55 of their brief, this argument of appellants is summarized in the statement:

> "That the Commission exceeded its statutory authority in making the orders complained of, has, we feel, been demonstrated by what has been said above."

It may be conceded that in this case the divisions were dealt with by the Commission on a group basis, but it is equally clear that the order "is based upon evidence which the Commission assumed was typical in character and ample in quantity to justify the finding made in re-

spect to each division of each rate of every carrier". *New England Divisions Case*, 261 U. S. 184, 196. It should be observed that appellants nowhere contend that the record did not contain the evidence which they claim the Commission should have considered but did not. In fact, they have gone to some pains to demonstrate that the record was complete with respect to the rates, divisions and other facts relating to each individual respondent, and in this they are correct.

All of the tariffs containing the rates in effect at the time of the hearings, and the divisions of which were in issue, were stipulated into the record (R. 1298). The division sheets were physically put in evidence as Exhibits A-5, A-6, A-7 (R. 168 *et seq.*), A-236 (R. 886), and A-200 (R. 837). The application of the divisions contained in these division sheets to the rates carried in the tariffs, as made in the case of individual shipments, was shown in detail in Exhibits A-41 to A-49, inclusive (R. 247 *et seq.*) and Exhibits A-116 to A-123, inclusive (R. 501 *et seq.*). These exhibits covered all carload traffic moving in June and October, 1924, over the lines of the respondents in the proceedings before the Commission, between Western Trunk line territory and Southwestern territory. With respect to each such shipment, they showed the total revenue, junction, originating and delivering line, commodity, origin, destination, weight, length of haul north and south of junction, total revenue as divided, revenue per car mile in cents, tons hauled one mile, and much other miscellaneous information.

As is pointed out by the lower court in its decision herein (R. 1329), these exhibits are of the same character as the September, 1928, test introduced in the lower court by appellants (petitioners' Exh. 10, R. 1226), and which, it was claimed (R. 1225), adequately, completely and

fully showed exactly what would happen under the divisional arrangement prescribed by the Commission. In addition to these 17 exhibits, 169 others were introduced by respondents to show the character of the traffic and the rates and divisions thereon. These exhibits showed every conceivable fact with respect to all commodities handled by every respondent.

Thirteen exhibits showing general operating statistics were introduced by the parties. Exhibit A-124 (R. 512) introduced by the Southwestern lines, and Exhibit A-241 (R. 922) introduced by the Western Trunk lines, are representative of this class of exhibits. They show every fact with respect to the income, expenses, investment, rate of return and density of traffic of each respondent. Forty-nine exhibits were introduced by all respondents to show the physical characteristics of their individual lines, and the efficiency of their operation. In addition many other exhibits were offered, showing rate levels, mileages, rate scales and other pertinent facts. And all these exhibits were accompanied by detailed testimony given by no less than 38 witnesses.

This evidence was ample to enable the Commission to give due consideration to every factor mentioned in Section 15 (6) of the Interstate Commerce Act and every other fact or circumstance having a bearing on the issues. That it did so with respect to each respondent is apparent from its reports, even though the order deals with the divisions in the aggregate. In its first report the Commission said, after referring to the matters required to be given consideration under Section 15 (6) of the Interstate Commerce Act (R. 85):

> "In reaching our conclusions, we have taken all these matters into consideration to the extent that the record makes it possible to do so."

The matters there referred to are the same matters

which appellants say the Commission should have considered, and it is certain and not disputed, that the record was ample to enable the Commission to give full consideration to every factor mentioned in the statute. Indeed, the Commission could not have failed to give consideration to the facts with respect to each carrier, for the proof before it was made in that manner.

Under these circumstances, we submit that the decision of this court in the *New England Divisions Case, supra,* is conclusive. In that case the facts were substantially the same as they are in the case at bar. At page 514 of its first decision in that case (62 I. C. C. 513), the Commission said:

> "Complainants urge that the divisions be treated 'as a whole', not individually; that is, that blanket increases be applied to the divisions without regard to the specific divisions of individual joint rates."

Again, at page 548, it said:

> "The exhibits were not submitted to show that any particular division is unjust, unreasonable, or inequitable; no attempt was made to deal with divisions individually; and all of complainants' traffic witnesses stated they dealt with the situation only 'as a whole'."

A somewhat different situation exists in the case at bar, in that the individual divisions of each respondent are dealt with in the evidence, and the impropriety found by the Commission was shown to exist with respect to each such division. The Commission apparently had some doubt of its authority to do as it was then requested, for at page 563 of its opinion it said:

> "To treat the complainants 'as a whole' or as a group would disregard the differences which obtain between the complainants individually. Much of the evidence adduced was solely in behalf of the New Haven and manifestly has no application to conditions on the Bangor & Aroostook, the Central Ver-

mont, or the Rutland. The conditions obtaining on the lines of complainants are so essentially dissimilar that general relief would not afford each of them reasonable and equitable divisions."

In that decision, the Commission, while recognizing the impropriety of the divisions attacked, entered no order and suggested the establishment of proper divisions through conference. Commissioner Eastman dissented from the conclusion of the Commission with respect to its power to establish divisions in the aggregate, taking the position that if the Commission did not have the power to fix divisions in the manner suggested, it would be deprived of a substantial jurisdiction obviously intended to be conferred upon it under the Transportation Act of 1920. Commissioners Potter, Campbell and McChord concurred in his dissent.

The second report of the Commission in this case appears at 66 I. C. C. 196, from which it appears that the readjustment suggested by the Commission had not been carried out, and that an order was necessary. Therefore, upon the record which had theretofore been made, the Commission adopted the theory of its power contended for by Commissioner Eastman and those who agreed with him, and awarded to the New England carriers a 15 per cent increase in their divisions of the joint class rates and the joint commodity rates which divided on the same basis, excepting from the order the complainant, Bangor & Aroostook Railroad Company (p. 206).

Commissioner Hall expressed his "profound dissent" from this conclusion of the Commission (p. 208), pointing out that all the rail carriers in New England were not complainants and that all the other rail carriers in the United States were not defendants; that many of the defendants were in poorer financial condition than some complainants; and that no attempt was made to ascer-

tain the effect of the Commission's order upon individual defendants or to ascertain whether or not their divisions would be just and equitable under the order. Commissioner Daniels also dissented (p. 210), pointing out that the order did not affect all traffic nor all carriers participating in the traffic which was affected, and specifically condemned the theory that the Commission had the power to deal with the divisions in the aggregate. Commissioner Esch also dissented.

We have then, in the dissents from the second report of the Commission in the *New England Divisions Case*, a complete and comprehensive statement of the objections now urged by appellants to the order here involved. Every fact now urged by appellants was referred to in those dissents. The order of the Commission in that case dealt with the divisions in the aggregate, as the order in this case does; all the New England roads were not complainants in that case and all the Western Trunk lines were not respondents in this case; in that case many defendants were in worse financial condition than some of the complainants, and to some extent, that is true here; all the traffic was not affected by the order in that case, and the same thing is true here.

With this background, the *New England Divisions Case* was presented to this court and decided at 261 U. S. 184, the Commission's order being sustained. At page 187 of its decision, this court pointed out that the order was to continue in force only until the further order of the Commission. Exactly the same reservation is made in the orders here attacked.

At page 196 *et seq.* of its decision, this court dealt with the argument that the order was void because Congress did not confer authority upon the Commission

to fix divisions as between groups of carriers without considering the carriers individually. It is said:

> "Whether Congress did confer that authority, we have no occasion to consider; for the Commission did not base its order upon any such theory. The order directs a 15 per cent increase in the divisions to the several New England lines. It is comprehensive but it is based upon evidence which the Commission assumed was typical in character, and ample in quantity to justify the finding made in respect to each division of each rate of every carrier."

Exactly the same thing was done in the case at bar, for the orders attacked are based upon evidence much more ample in quantity than that introduced in the *New England Divisions Case.* Dealing with the claim that the Commission should have determined the divisions of each carrier upon a consideration of the evidence relating only to it, this court said in the *New England Divisions Case,* at page 197:

> "To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past and how it had dealt with them."

After referring to the practice of the Commission in making comprehensive rate changes, this Court said at page 198:

> "It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such enquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it. • • • It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint

> rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing."

The decision of this Court in the *New England Divisions Case, supra*, in view of the history of that case before the Commission, would seem to completely dispose of the argument now made by appellants.

Nor do the decisions of this Court in *U. S.* v. *Abilene & Southern R. Co.*, 265 U. S. 274, and in *Brimstone R. Co.* v. *U. S.*, 276 U. S. 104, help appellants' argument. In both of those cases, the principle of the *New England Divisions Case, supra*, is affirmed. In the *Abilene & Southern Case*, the language quoted in appellants' brief (p. 36) only condemns an inference that existing divisions of every joint rate are unjust because the aggregate result appears to be unjust; and the *Brimstone Case* only condemns an order which required the Brimstone Company to give up something because, as stated by this court, its revenue appeared unduly large. In both cases, however, this court affirmed the right of the Commission to make an order, if, as stated in the *New England Divisions Case, supra*, it is based on evidence which, in the Commission's opinion, is typical in character and ample in quantity to justify the finding made in respect to each division of each rate of every carrier. That there was such evidence before the Commission in this case cannot be disputed.

In the *New England Divisions Case, supra*, this court

referred to the impossibility of administering the law if a separate adjudication of each division of each rate was required. The correctness of this conclusion is demonstrated on the record in this case. Upon the last hearing before the Commission, held at Washington on June 29, 1926, inquiry was made by the Examiner as to the method that the parties expected the Commission to adopt in disposing of the case. The Examiner inquired (R. 1109):

> "What I was trying to get at is the Commission will have to decide this case, and my question to you is whether you expect this Commission to pass on all the different divisions by the different gateways, and tell you whether the rates should break on St. Louis or Kansas City, on one commodity and not on the other, or whether it should be on a constructive mileage prorate or on any other basis."

The following colloquy then occurred:

> "Mr. Towner: So far as I am concerned I do not expect the Commission to go into that detail in respect to divisions.
>
> Examiner Disque: What do you expect?
>
> Mr. Towner: I expect the Commission to prescribe some sort of mileage basis.
>
> Examiner Disque: What sort of mileage basis, a mile and a half or a mile and a quarter?
>
> Mr. Towner: Whatever the Commission finds to be proper between groups.
>
> Examiner Disque: In the aggregate?
>
> Mr. Towner: Yes, sir, and then we ought to be able to work it out.
>
> Mr. Muckley: You mean without splitting up the territory?
>
> Mr. Towner: You are going into too much detail. In answer to Mr. Disque's question whether I expect to go into that detail, I will say I do not.
>
> Mr. Muckley: You mean in each division?
>
> Mr. Towner: What I meant was to take each rate on individual commodities, or anything of that sort. I do not intend that.
>
> Mr. Muckley: I do not think the case could ever

be decided if you did that, because it would take too long."

Here we have a concrete admission by one of the principal counsel for appellants that if the Commission was required to do what appellants contend it should have done, it could not have decided the case. Certainly, when Section 15(6) of the Interstate Commerce Act was enacted into law, the Congress intended to confer a definite power upon the Commission. It would seem rather absurd to construe the statute in such a way as to prevent the Commission from exercising that power. This court has already declined to so construe it.

Nor does the order of the Commission produce the results alleged by appellants at pages 43 *et seq.* of their brief. It does not require Kansas City, Mexico & Orient Railway, the St. Louis Southwestern Railway Company of Texas, the Kansas, Oklahoma & Gulf Railway, and the Louisiana Railway & Navigation Company to pay any amounts to any railroad in Western Trunk line territory, and does not require the Missouri-Kansas-Texas Railroad or the Kansas City Southern to pay the amounts mentioned by appellants to the Illinois Central and Burlington. As we have heretofore pointed out, the order only relates to the division of total revenue at the junctions where the traffic is interchanged between the Western Trunk lines and the Southwestern lines. As we have also pointed out, the divisions of the Western Trunk lines are not increased on all traffic.

In cases where the order increases the revenue of the Western Trunk lines, the Southwestern lines which will lose money cannot be determined until a subdivision of revenue is agreed upon by the Southwestern lines. This is a matter not dealt with in the Commission's order. The evidence referred to by appellants in support of their statement (R. 1230, 1232, 1234) consists entirely of

estimates, in which it is assumed that the losses and gains will accrue to the roads named. It was not necessary that the Commission's order should pass on the subdivisions of revenue north and south of the junctions. This court said in *U. S.* v. *Abilene & Southern R. Co., supra,* at page 283:

> "For it was not necessary that all controversies which may conceivably arise should be settled in a single proceeding."

Appellants take exception to the Commission's statement (R. 99) that the case was tried by all respondents on a group basis, and the holding of the lower court to this effect (R. 1326 *et seq.*), but that this was so cannot be doubted. One witness connected with the St. Louis-San Francisco Railway undertook to limit his testimony to his own railway, whereupon he was corrected by his counsel, one of the solicitors for appellants, who said to him:

> "You are representing all of the carriers of the Southwest here."

Later on, the counsel for the Southern Pacific, one of the solicitors for appellants in this court, said to the same witness:

> "You are speaking now for all lines in the Southwest, are you not?"

to which the witness replied (R. 839):

> "Yes, sir."

Another witness, associated with the Atchison, Topeka & Santa Fe Railway Company, introduced his testimony on the hearings before the Commission as follows (R. 539):

> "The Southwestern lines, believing a history in so far as it is available, of the class rates * * * would be helpful in reaching a decision in this proceeding, submit the following."

Another witness, associated with the Missouri Pacific

Railroad, one of the appellants here, testified (R. 595, 596):

> "The Southwestern lines found it necessary to assign the testimony with respect to divisions to individual carriers, depending upon the gateways or states of the Southwest in which their line is more vitally interested. * * * My testimony will therefore include all of the interested Southwestern lines in connection with the divisions via the several gateways and Southwestern states previously mentioned."

The foregoing is representative of the manner in which the proceedings before the Commission were conducted by the Southwestern carriers. Even the statement of Mr. Dana (R. 902) quoted in appellants' brief (pp. 48, 49) relates to the fixation of divisions by groups. In his proposed report, the Examiner of the Commission (R. 1185) dealt with the divisions north and south of the junctions in the aggregate, but the Southwestern lines filed no exceptions to this report. The first report of the Commission did the same, yet in their petition for rehearing, the Southwestern lines made no objection to this method of treating the matter. The point was raised in the lower court for the first time.

Nor can appellants avoid the effect of handling the case in this manner by claiming a lack of knowledge on their part as to the issues. As we have pointed out, the first order entered by the Commission fully advised them of what was in issue and what action was contemplated (R. 1169). And early in the hearings, they were advised by the Western Trunk lines that they felt they were not getting sufficient money in the division of the Southwestern rates (R. 358).

As a matter of fact, appellants' argument on this point, carried to its logical conclusion, would require a different divisional arrangement on practically every shipment

moving between Southwestern and Western Trunk line territories. The basis would even be different on shipments of the same commodity, between the same points, via the same junctions, if such shipments were handled by different Western Trunk lines north of the junction and different Southwestern lines south of the junction. Such a system of divisions would be grotesque, even if it was possible to put it into effect.

In the light of the record made before the Commission, and in view of this court's decision in the *New England Divisions Case, supra,* we submit that noly one answer is possible to this argument of appellants. That answer is appropriately expressed in the decision of this court in the *New England Divisions Case, supra,* and in the decision of the lower court in this case. No argument is put forth in this case which was not put forth with equal force in the *New England Divisions Case, supra.* No issue is here presented that was not there presented and decided adversely to appellants' contention.

II.

THE ORDER OF THE COMMISSION DOES NOT OPERATE TO CONFISCATE THE PROPERTY OF APPELLANTS AND TO TAKE THEIR PROPERTIES WITHOUT DUE PROCESS OF LAW. CONFISCATION IN THIS CASE IS NOT PROVEN BY A SHOWING OF RATES OF RETURN ALLEGED TO BE INADEQUATE. MOREOVER, THERE WAS NO CLAIM MADE BEFORE THE COMMISSION THAT THE PROPERTY OF APPELLANTS WOULD BE CONFISCATED THROUGH AN ORDER REDUCING THEIR DIVISIONS AND IT CANNOT BE URGED NOW.

In Subdivision II of appellants' brief, at pages 56 to 64, inclusive, it is argued that because appellants, on the evidence offered on the hearings before the Commission, were not earning as great a return upon their book in-

vestment as, perhaps, they should have earned, the order of the Commission is confiscatory and in violation of their constitutional rights. The legal theory of the argument is that since the Commission's order will, on the whole, decrease the earnings of appellants and lessen their rates of return, alleged to be already insufficient, confiscation necessarily results.

Appellants fall into the initial error of assuming that the order of the Commission was made primarily to relieve the financial necessities of the Western Trunk lines, whereas, this is not the case. It is true that the Commission found that the financial condition of the Western Trunk lines was not as good as that of the Southwestern lines, as in summarizing the evidence, it found (R. 86):

> "That the financial condition of complainants is not, on the whole, as good as that of defendants."

It is perfectly obvious, however, from a reading of the Commission's two reports that the financial condition of the Western Trunk lines was not the primary reason for the Commission's decision, although it was, of course, given consideration. The Commission, as appears from its reports, gave consideration to all factors which it was necessary for it to consider in order to reach its conclusion, and it decided, upon a consideration of all those factors, that the divisions were improper and should be changed.

The claim of confiscation was not urged before the Commission, although, as we have pointed out, appellants must have had in contemplation at all times the possibility of their divisions being reduced. The claim was made for the first time in the trial court, where that court disposed of it by saying (R. 1332):

> "This question does not seem to have been urged before the Commission, and the purpose of the order is not to take from one set of carriers revenue and transfer it upon another. The most that can be

claimed as to the evidence on this point is that it shows that certain of the railroads earn less than five and three-quarters per cent upon their total investment. This is not a sufficient basis for assailing the order in question. *N. P. R. R. Co.* v. *Dept. of Public Works*, 268 U. S. 39. There is no showing that the reduction in their share of revenue arising from traffic moving between the Western Trunk line territory and the Southwestern territory will operate in any way to confiscate petitioner's property."

The claim of confiscation in this court is based upon the same grounds as those urged in the trial court. The case of *United Railways* v. *West*, 280 U. S. 234, is cited, but that case was a street railway company case in which the entire value of the railway company's property had been proven and in which there was involved all the rates which the railway company was permitted to charge under an order of the Public Service Commission of Maryland. It is in no way analogous to the question here under discussion.

Nor are the *Minnesota Rate Cases*, 230 U. S. 352 in point. In those cases there was involved the application of rates fixed by the Railroad & Warehouse Commission of Minnesota, and the carriers contesting the rates put in evidence specific proof of the value of their properties in Minnesota and the return that would be allowed thereon under the rates established by the State Commission. It affirmatively appeared (p. 471) that the net earnings of the Minneapolis & St. Louis Railroad, referred to in petitioners' brief, on all its business in Minnesota, interstate and intrastate, involving any use of the Minnesota property which had been valued, was less than a fair return. And in *Norfolk & Western R. Co.* v. *Conley*, 236 U. S. 605, there was evidence in the record which enabled this court to conclude that the two-cent passenger rate then in issue was so low that as a result thereof, the com-

pany was forced to carry passengers, if not below cost, with merely a nominal reward.

Instead of presenting such a case as was presented to this court in the *United Railways Case, supra*, the *Minnesota Rate Cases, supra*, or the *Norfolk & Western Case, supra*, appellants rely entirely upon a showing that the rate of return earned by the Southwestern lines as a whole, on their book investment, during the years covered by the evidence before the Commission, upon all the traffic handled by them, was less than the 5.75 per cent return contemplated by Section 15 (a) of the Interstate Commerce Act and the 7.44 per cent return approved in the *United Railways Company Case, supra*. This proof is manifestly not sufficient. No argument is made that the reduction in their divisions resulting from the Commission' s order is the cause of that failure on their part to earn a higher return, and indeed no such argument could be made.

The rates of return on book investment, referred to by appellants as proving their claim of confiscation, are based upon system figures, which include the expenses incurred in and the revenue derived from handling all their traffic. There is included all kinds of freight, main line, branch line, interstate, intrastate, carload and less-than-carload traffic, affected by the Commission's order and traffic not affected by the Commission's order, and passenger traffic. The record contains no segregation of investment chargeable to the traffic affected by the Commission's order, no segregation of the cost of handling that traffic, and no segregation of the net return, derived from handling that traffic, upon the investment chargeable thereto. On this subject, the Commission said in its second report (R. 105):

> "Reverting to the criticisms in the petiton, we were compelled to use system statistics because the

carriers were unable to segregate the interchange traffic and show the respective costs of service for that alone, and no offer of such segregated costs is made in the present petition."

Under the decisions of this court, appellants cannot successfully contend that their property will be confiscated under the Commission's order, unless they can show that under that order, the revenue each appellant will receive in the division of the joint rates applicable on the traffic involved, is insufficient to pay the cost incurred by it in transporting such traffic and a fair return upon the value of the property devoted to its transportation. No such proof was offered before the Commission, nor in the lower court. For all that appears in the record, the failure of appellants to earn a proper return on their entire investment is due to their divisions on other traffic, to insufficient rates or some other cause.

In *Northern Pacific Railway Company* v. *Department of Public Works*, 268 U. S. 39, the railroads attacked an order of the Public Service Commission of Washington, which order required a reduction in the railroad rates on logs. As appears from the opinion of this court (p. 43), the railroads showed in their evidence that the existing rates were so low as not to yield any return upon the value of the property employed in the traffic, the operating cost incurred in handling it, and its proportion of taxes payable. In answer to this specific evidence which related only to the log traffic upon which the rates attack applied, the Department of Public Works showed that the system figures of the plaintiffs justified other conclusions. In describing this evidence of the Department, this court said at page 43:

"Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the several carriers, the Department created a composite figure representing

the weighted average operating cost per 1,000 gross ton miles of all revenue freight carried on the four systems and made that figure a basis for estimating the operating cost of the log traffic in Washington. This was clearly erroneous. * * * A precise issue was the cost on each railroad of transporting logs in carload lots in western Washington, the average haul on each system being not more than 32 miles. In using the above composite figure in the determination of this issue, the Department necessarily ignored in the first place, the average unit cost on the several systems; and then the differences on each in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation is conducted. In this unit cost figure, no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul; in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, carload and less-than-carload, are counted alike. The Department's error was fundamental in its nature."

Thus, the case made by the Department was condemned, because it arrived at its conclusions through a use of the same system figures used by appellants in arriving at their conclusion that the order of the Commission will confiscate their property. To the same effect is *Chicago, Milwaukee & St. Paul R. Co.* v. *Utilities Commission,* 274 U. S. 344. In *Interstate Commerce Commission* v. *U. P. R. R.,* 222 U. S. 541, this court said at page 549:

"Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the ques-

tion as to whether the rate on a particular article is reasonable."

The foregoing is cited with approval in *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 603.

It follows that in this case, as in the case cited, appellants claim that the Commission's order will operate to confiscate their property cannot be successfully predicated upon figures which show nothing but the rates of return received by them as a result of all their activities. It will be observed that in the arguments made by appellants on this point they do not even undertake to point out what percentage of their total traffic is represented by the traffic involved in the proceedings before the Commission. They have not even shown the rates of return on total book investment for their own lines alone, but base their argument on showings which include all Southwestern respondents, eight of whom did not attack the Commission's order, and are not before this court.

And it is interesting to observe that appellants' argument on their confiscation theory is made on a group basis only; the basis condemned by them when used by the Commission in entering its order. As a matter of fact, it is impossible at this time to say with assurance that any particular Southwestern line will lose money under the Commission's order, for as we have pointed out, that order requires an increase in some Southwestern divisions and does not prescribe any subdivision of Southwestern revenue among the Southwestern lines. The Southwestern lines do point out that but 2½ per cent of the revenue of the Western Trunk lines is derived from the joint rates, the divisions of which are fixed by the Commission, but refer to this fact only as a basis for the suggestion that a small rate increase would mean a greater increase in Western Trunk line revenue than the

increase in divisions required by the Commission's order.

On appellants' theory of the proof sufficient to show a confiscation, the Western Trunk lines are able to make a much better showing. In 1924, when the Southwestern lines, including the Santa Fe and Rock Island, earned 4.36 per cent on their book investment, the Western Trunk lines, on the same basis of computation, earned 3.55 per cent. In the same year, the Southwestern lines, excluding the Santa Fe and Rock Island, earned 4.44 per cent, and the Western Trunk lines, on the same basis of computation, earned 3.31 per cent (R. 80). Including the Santa Fe and Rock Island in both groups, the average rate of return on the investment of the Western Trunk lines for the years 1916 to 1925, inclusive, was 3.98 per cent, as compared with a rate of return of 4.30 per cent for the Southwestern lines. Excluding the San Francisco and Rock Island from both groups, the Western Trunk line average rate of return for the same years was 3.65 per cent as compared with the Southwestern line's average rate of return of 3.95 per cent. The same table shows that the strictly Western Trunk lines in 1924 earned 2.23 per cent on their book investment and the strictly Southwestern lines earned 4.81 per cent on their book investment (R. 84).

In the *Abilene & Southern Ry. Co. Case, supra* this court said, in discussing a somewhat similar claim made by defendants (p. 285):

> "It was not contended before the Commission that a reduction of the carriers' divisions would reduce their rates below what was compensatory. There is in the record no evidence on which it could be determined that any of the divisions ordered will result in confiscatory rates. And there is nothing in the order which prohibits rate increases."

All these things are equally true of the case at bar.

We submit that on the law and the evidence, appellants' claim of confiscation cannot prevail.

III.

THE COMMISSION'S ORDER IS VALID IN SO FAR AS IT UNDERTAKES TO FIX DIVISIONS ON TRAFFIC TO AND FROM POINTS EAST OF THE ILLINOIS-INDIANA STATE LINE. THE EASTERN CARRIERS WERE NOT NECESSARY PARTIES AND EVIDENCE WITH RESPECT TO THEIR DIVISIONS WAS NOT REQUIRED.

The fifth paragraph of the Commission's order of June 10, 1929, (R. 112) establishes the divisional basis to be applied in the division of the rates applying on traffic between points in Southwestern territory and points in the territory east of the Illinois-Indiana State line and north of the Ohio River. That portion of the Commission's order provides:

> "The just, reasonable and equitable divisions, in the aggregate, south and north of the said gateways of the shares of said joint rates accruing to the above listed respondents participating therein shall be determined on and after August 1, 1929, etc."

This paragraph of the order provides for the division between the Western Trunk line and the Southwestern line of that revenue which accrues to both groups of carriers on the traffic to and from the East and is easily understood under a complete statement of the facts. The statement made by appellants in connection with this point, at page 65 *et seq.* of their brief, does not contain all the facts and is otherwise inaccurate.

As appears from the testimony of Mr. Leland (R. 1290 *et seq.*), when the divisions of the rates between the Southwest and Eastern territory were made applicable to Mississippi River crossings north of East

St. Louis, it became necessary for both the Southwestern and Eastern carriers to use the Western Trunk lines. Appellants point out (p. 66, appellants' brief) that the Eastern carriers must use the Western Trunk lines to reach the upper Mississippi River crossings. They do not point out, however, that the Southwestern carriers must also use the Western Trunk lines to reach the same crossings, and yet this is the fact, since no Southwestern line serves any Mississippi River crossing north of East St. Louis.

Thus, a through line is formed, consisting of the Southwestern lines at one end, the Eastern carriers at the other end, and the Western Trunk lines in the middle. The Western Trunk lines are not only employed to perform the transportation between their connections with the Eastern carriers and the Mississippi River but are also employed to perform the transportation between their connections with the Southwestern lines and the Mississippi River.

In dividing the joint rates on traffic moving over these through routes, the primary division is made on the Mississippi River (R. 1291). The Western Trunk lines participate in the transportation east and west of the Mississippi River, and as Eastern carriers, participate with other Eastern carriers in the subdivision of the revenue assigned to the total service east of the River, and as Western carriers, also participate with the Southwestern lines in the subdivision of the revenue assigned to the total service west of the River (R. 1293).

Appellants say that the Southwestern lines have never had any relations with the Western Trunk lines on this class of traffic, but this is not in accordance with the record. Mr. Leland said (R. 1291) that the Western Trunk lines had an arrangement with the Southwestern lines for dividing the revenue remaining to all of them for

the total service performed west of the Mississippi, after the lines performing the service east of the River had taken the revenue assigned for their service. It is this arrangement between the Western Trunk lines and the Southwestern lines which is affected by Paragraph 5 of the Commission's order.

The Southwestern lines do not participate in the revenue on this traffic assigned to the service east of the Mississippi, but this is proper, for they do not participate in that part of the transportation. Nor do the Eastern carriers have any interest in the division between the Western Trunk lines and the Southwestern carriers of the revenue assigned to the total service west of the River, for they do not participate in that part of the transportation.

Paragraph 5 of the Commission's order does not in any way relate to or affect the revenue which accrues to the lines handling the traffic east of the River and in which the Eastern lines are interested. It only relates to the subdivision of that portion of the revenue assigned to the total service west of the River and which is divided between the Western Trunk lines and the Southwestern lines. For this reason, the Eastern carriers were not necessary parties to the proceeding; in fact, they would not have been even proper parties, since their revenue was not in issue and is not affected by the order. Appellants have apparently failed to understand that the Western Trunk lines act in a dual capacity in the transportation of the Eastern traffic affected by the Commission's order, and that only the division between the Western Trunk lines and the Southwestern carriers is affected by the Commission's order. The effect of that order is not to increase the revenue received by the Western Trunk lines from the Eastern carriers, as stated by appellants (pp. 66, 67, appellants' brief), but is

to readjust the division between the Western Trunk lines and the Southwestern carriers of the revenue assigned to the total service west of the River. It is settled that the Commission's order may be so limited. *U. S.* v. *Abilene & Southern R. Co. supra.* Since the argument of the Southwestern lines on this point is based on the incorrect assumption that the revenue of the Eastern lines is affected by the Commission's order, the argument must fail. The lower court so held (R. 1337).

IV.

COST OF SERVICE WAS ONLY ONE OF MANY FACTORS TO BE CONSIDERED IN FIXING THE DIVISIONS IN ISSUE. THERE WAS NO OBLIGATION UPON THE COMMISSION, THEREFORE, TO ESTABLISH DIVISIONS WHICH EXACTLY OR EVEN APPROXIMATELY REFLECT APPROXIMATE DIFFERENCE IN COST OF TRANSPORTATION.

Pages 71 to 83, inclusive, of appellants' brief are devoted to an attack upon the Commission's order because the Commission stated an approximation of the differences in cost of transportation in Southwestern territory as compared with Western Trunk line territory, and, as alleged by appellants, did not thereafter establish divisions which exactly reflected this difference in cost.

We say this because the statements from the Commission's reports, quoted by appellants, refer directly to cost of service. Appellants seem to be somewhat confused with respect to the point they are arguing, however, for they say (p. 72, appellants' brief), referring to the Commission:

> "It did state some considerations which in its opinion showed that a finding that the Southwestern respondents were entitled to an average revenue per ton mile 20 per cent greater than the Western Trunk

lines respondents was not unfair to the Southwestern respondents."

Appellants refer to no finding of the Commission to this effect, and as a mater of fact, the Commission did not so find. There is a substantial difference between a finding that the Southwestern lines are entitled to 20 per cent greater revenue per ton mile than the Western Trunk lines, and a finding of relative cost of service.

The objection now urged to the Commission's order was urged in the lower court and that court dealt with it in considerable detail (R. 1322 *et seq.*). The contention of appellants made in the lower court and now urged here, was accurately stated in the lower court's opinion, and may be shortly stated as follows:

Appellants refer to that language in the Commission's first report in which it is said that relative cost of service is a vital thing to ascertain. They then quote some of that language of the Commission in which that cost is approximated within rather wide limits so far as it is capable of approximation. For example, the Commission said, referring to the freight operating expenses per ton mile in 1924 of Class I carriers operating within the two groups, that "these figures indicate that it cost somewhere in the neighborhood of 15 per cent more per ton mile to haul freight in the Southwest than in Western Trunk line territory" (R. 78); that on the average of 1923 and 1924 operations the cost in the Southwest was "somewhere in the neighborhood of 20 per cent greater" than in Western Trunk line territory; that in 1924 it was "somewhere in the neghborhood of 17 per cent greater" (R. 83), and that the cost of operation per ton mile in the Southwest "probably does not average as much as 20 per cent higher" than in Western Trunk line territory (R. 86). All the foregoing statements had reference to the relative cost of handling all traffic in

both territories, and did not relate to the cost of handling the traffic involved in the proceeding before the Commission. The Commission also referred to the impossibility of securing the costs on the particular traffic involved (R. 85) and in its second report, to the fact that no offer of segregate costs was made by the Southwestern lines in their petition for rehearing (R. 105).

Having sorted the general statements on relative costs out of the first report of the Commission, and assuming them to be definite findings, the complaint of appellants apparently is that the revenue per ton mile received by them under an application of the Commission's order is not as much greater, in percentages, as the cost of transportation approximated by the Commission. This specific point was called to the attention of the Commission in the petition for rehearing and it dealt with the matter in detail in its second report (R. 103 *et seq.*).

There are many complete and obvious answers to appellants' argument. One is that it is based entirely upon evidence offered in the trial court for the first time and not submitted in the hearings before the Commission. Objection was made to this evidence when offered and the objection should have been sustained. In *Tagg Brothers et al.* v. *United States et al.* 74 L. Ed. 287, which was a case involving the validity of an order of the Secretary of Agriculture, this court said at page 295:

> "The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him,—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now * * *. To allow his findings to be attacked or supported in court by new evidence

would substitute the court for the administrative tribunal as the rate making body."

Moverover, there is no sufficient proof in the record that the application of the Commission's order will produce the results alleged by appellants. Their contention that the application of the order will not produce to them ton-mile earnings, greater by from 17 per cent to 20 per cent than the ton-mile earnings of the Western Trunk lines, is based entirely upon the testimony of witnesses Bone (R. 1225 *et seq.*) and Buechner (1227 *et seq.*). Mr. Bone introduced petitioners' Exhibit 10 in the trial court (R. 1226), but only identified it as being a printed statement

"showing the result of a study of the divisions as actually settled by the Western Trunk line respondents and the Southwestern line respondents of the revenue on traffic for the month of September, 1928, which is affected by the Commission's order."

He did not undertake to testify that this study, which covered only one month of 1928, was representative or reflected what the results of the Commission's order would be if applied over a greater period of time.

Mr. Buechner introduced as petitioners' Exhibit 11 (R. 1227), a statement concerning which he said that it showed that under the Commission's order, as applied to traffic handled by respondents during September, 1928, the Southwestern lines would receive 9 per cent more revenue per ton mile than the Western Trunk lines, instead of 20 per cent more (R. 1227). This same witness also introduced petitioners' Exhibit 13 (R. 1228), in which he undertook to show that on the basis of the traffic tests for June and October, 1924, introduced in the hearings before the Commission (Ex. A-41 to A-49, inc., to R. 247 *et seq.*, Ex. A-116 to A-124, inc., R. 501 *et seq.*), the Southwestern lines would fail, by stated amounts, to earn 20 per cent more revenue per ton mile than the Western Trunk lines.

We submit that this evidence does not prove that a complete application of the Commission's order to all traffic affected thereby would produce the results claimed by appellants. Even if it is proper to sort out the isolated statements with respect to relative cost and disregard everything else, and even if it was possible and required, that the Commission establish divisions which reflect the varying relation of cost approximated by it, we still submit that the proof that this has not been done should be complete and definite.

Such proof is not before this court. The evidence relied upon by appellants to show the fact, consists of petitioner's Exhibits 10 and 11, which are not said to be representative and typical, and petitioners' Exhibit 13, which is based on statements which were undoubtedly typical of the traffic at the time they were put in the Commission's record but are now six years old. We submit that such proof is not sufficient to demonstrate that the order does not produce the results which appellants say it should produce. And even if the order does not now produce these results, it may do so in the future. The Commission was not prescribing divisions for a day only but for an indefinite time in the future and with respect to future conditions, the Commission said (R. 83):

> "The evidence indicates, as we have already pointed out, that the trend of changing conditions is more favorable to defendants than to complainants."

The position assumed by appellants in their argument is fundamentally unsound. As is pointed out in the opinion of the lower court (R. 1323 *et seq.*), appellants have selected cost of service as being the only factor to be considered in fixing the divisions. Their argument requires that every other factor which the law says the

Commission should consider, be ignored. In their petition for rehearing, the Southwestern lines insisted to the Commission that relative cost of service is not the only thing to be considered in fixing divisions, and that many other things must be considered. The Commission in its second report (R. 101, 102) conceded the correctness of this contention, saying:

> "There are other matters to be considered, such as the efficiency with which the carriers concerned are operated and the importance to the public of the transporation service of such carriers, but all of these we took into consideration after summarizing the pertinent evidence."

Appellants now reverse their position and instead of critizing the order because cost of service is given too much weight, insist, in effect, that it should be the only thing that should be given consideration. Had the Commission actually done this, its order would certainly have been invalid. It will be observed that appellants do not refer to any statement in either report of the Commission that its approximations of relative cost should be accurately reflected in the distribution of revenue. There is no such statement.

Moreover, there is not even a definite finding of relative cost upon which appellants' argument can be predicated. The statements of the Commission on the subject were indefinite, and this indefiniteness could not be avoided, for, as pointed out by the Commission in its second report (R. 105), it was impossible to segregate the cost on the traffic under consideration, and no offer of such segregated costs was made by petitioners in their petition for rehearing. In its reports, the Commission refers to cost differences "in the neighborhood of" 15 per cent, 17 per cent and 20 per cent, and to a difference something less than 20 per cent; these statements being based upon a consideration of all operations of the car-

riers. Is the Commission's order, affecting only a part of the traffic, to be condemned because it does not produce a distribution of revenue thereon, exactly reflecting the indefinite relative costs found to exist with respect to all traffic? We think not.

In the hearings before the Commission, the best proof possible was made. Both groups of carriers supplied the best and most exact evidence which could be secured. The first report of the Commission, in which all this evidence is discussed, is a connected, coherent whole. Every factor bearing upon the propriety of the divisions is discussed. All evidence relating to each of those factors is considered and assigned its due weight. The report reviews the evidence with respect to the revenue and the division thereof; the volume and character of the traffic; changes in the conditions in the two territories since the divisions were established; the character of the service performed by all respondents in the two territories; density of traffic; the physical operating conditions in the two territories; rate levels; general operating and revenue statistics of all respondents; efficiency of operation by all respondents; relative cost of service; relative lengths of haul; the financial conditions of respondents and other matters. We know of no rule of law which invalidates the Commission's order because it is not based entirely upon the conclusions reached by the Commission with respect to only one of the factors required to be considered.

It is again suggested by appellants in connection with this argument (p. 73 appellants' brief) that perhaps the record before the Commission was insufficient, although there is no definite statement that this is so. The insufficiency of the record is inferred, however, because of the Commission's statement that it had given consideration to all matters "to the extent that the record

makes it possible to do so." This language was an entirely legitimate limitation upon the Commission's statement. It is a far cry, however, from that language to the conclusion that the record was actually insufficient. As we have heretofore shown in some detail, the record before the Commission is complete and adequate in every respect.

There is also an inferred criticism of the Commission's report because "there were no findings with reference to the other matters specified in paragraph (6) of Section 15 of the Interstate Commerce Act" (p. 73 appellants' brief), although there is no statement that the law requires the Commission to make such findings, and at page 81 of their brief, appellants complain that the order is not based on the findings in the report. In any event, the statements numbered 1 to 6, contained in the first report of the Commission (R. 85, 86), are findings. Each and all of them are based upon evidence in the record, and support the propriety of an increase in the divisions allowed the Western Trunk lines.

The suggestion of appellants is that the defect alleged by them to exist in the Commission's order could have been obviated by ordering a division of the revenue on a mileage prorate (p. 78 appellants' brief). With respect to the propriety of such a basis of divisions, the Commission said in its first report (R. 64):

> "Nor does this fully indicate the relative advantage of the Southwestern lines, for a mileage prorate is by no means a perfect method of dividing joint rates, even where transportation and other conditions do not differ materially. It results in the same ton-mile revenue for each participating carrier, regardless of the length of haul and of the principle that, other things being equal, ton-mile yields should decrease as distance increases. New England Divisions, 126 I. C. C. 579, 667."

This is a matter committed to the exclusive jurisdiction of the Commission.

No case cited by appellants supports the argument they have made. In *Interstate Commerce Commission* v. *Chicago Burlington & Quincy R. R. Co.*, 186 U. S. 320, the Commission had made two definite findings that the components of the through rate attacked were reasonable. This court held that, having found both components reasonable, the total produced by adding the two together could not be found unreasonable or reduced. In *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, and the *Chicago Junction Case*, 264 U. S. 258, it is only held that the facts proven in the evidence must support the order of the Commission.

We will concede that an order of the Commission cannot be sustained if there is no evidence in the record to support it, but that is not the case here. The evidence was ample to support every conclusion reached by the Commission, and an examination of the record will so show. In effect, appellants' argument is that instead of doing what it did do, the Commission should have taken a different view of the evidence and should have done something else. The whole question is, after all, one of weight to be given the evidence adduced before the Commission, and on this point, this court said in the *Louisville & Nashville Case, supra*, at page 98:

> "The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate-making in each section of the country."

On this point see also *Virginian Railway Company* v. *United States*, 272 U. S. 658, 663; and *Assigned Car Cases*, 274 U. S. 564, 580. Even had the Commission

made a definite and concrete finding with respect to the higher cost of transporting the traffic involved in the Southwest, and had then, after considering all other matters that it should consider, ordered divisions which did not reflect in the revenue the exact difference in cost found by it, we still submit that its order could not be successfully attacked on that ground. In the same *Louisville & Nashville Case, supra,* this court said, at page 98:

> "It is unnecessary in this case to review each of the matters discussed, ruled and found by the Commission in its Report and only the more salient facts will be mentioned. For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended. These findings are collateral and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order."

And appellants' argument that relative cost of service should be the only matter to be considered, is answered in the *Abilene & Southern Case, supra,* where this court said, at page 284:

> "Relative cost of service is not the only factor to be considered in determining just divisions."

V.

THE ORDER IS IN THE PUBLIC INTEREST, AND THE COMMISSION DID NOT EXCEED ITS AUTHORITY IN MAKING IT.

At pages 83 *et seq.* of their brief, appellants argue that the Commission's order is not in the public interest, because, it is alleged, it requires some Southwestern carriers to pay increased divisions to some Western Trunk lines which are in better financial con-

dition, and is, therefore, void. The argument assumes that the Commission's order was entered for the sole purpose of relieving the financial distress of the Western Trunk lines, whereas, as we have pointed out, that is not the case. The lower court so found (R. 1331). It also assumes that individual Southwestern carriers will be compelled, under the order, to pay money to more prosperous Western Trunk lines, whereas, as we have pointed out, this does not appear from the record or the order and cannot be determined until there is a subdivision between the Southwestern carriers, of the revenue assigned to them on traffic upon which the Western Trunk lines are given larger divisions.

We have no quarrel with the cases cited by appellants in connection with this argument, except to point out that they have no particular bearing on the subject. It may be conceded that the Commission is required to take the financial needs of interested lines into consideration in fixing divisions, and their reports show that they did so in this case (R. 86). It may also be conceded that in fixing divisions the Commission is required to give consideration to the importance to the public of the transportation service of the carriers in each group, and their reports show that they did so in this case (R. 57, 58). We may also concede that an order of the Commission fixing divisions should be in the public interest, but the order here attacked cannot be criticized on the ground that it is not in the public interest. Having found the divisions as between the Western Trunk lines and the Southwestern lines to be improper, it is obvious that the Commission could only serve the public interest by entering an order requiring the necessary readjustments.

Even if we assume, as appellants claim, that the order here attacked will require some Southwestern

lines to pay increased divisions to some Western Trunk lines which are in better financial condition, that requirement will not invalidate the order. In the *New England Divisions Case, supra,* exactly the same situation existed. That fact was a primary ground of dissent mentioned by those members of the Commission who dissented from the conclusions of the majority (66 I. C. C. 196, 209). Notwithstanding this circumstance, this court sustained the Commission's order. With respect to the argument now made, the same conclusion should be reached.

VI.

THE EVIDENCE INTRODUCED IN THE HEARINGS BEFORE THE COMMISSION WAS COMPLETE AND DEFINITE AS IT WAS POSSIBLE FOR IT TO BE. IT FULLY SUPPORTS THE REPORTS OF THE COMMISSION AND ITS ORDERS.

At pages 86 to 91, inclusive, of their brief, appellants urge that the evidence before the Commission is so incomplete and unreliable that the order is wholly void. No reference, however, is made to any portion of the record or to any evidence alleged to be incomplete or unreliable, and there is no statement of any necessary proof that was not presented. Instead, reference is only made to certain portions of the Commission's first report in which the Commission reaches certain conclusions upon the evidence of record.

In considering this argument, it should be remembered that appellants were as much respondents in the proceeding before the Commission as the Western Trunk lines, and were under the same obligations with respect to the introduction of testimony if they desired to retain the divisions they were then receiving. While

appellants claim that the burden of proof was upon the Western Trunk lines, citing the *Abilene & Southern Case, supra,* in support of this contention, this is obviously not so in a proceeding of this character, instituted by the Commission on its own motion and in connection with which there was no specific complaint.

While the proceeding may have been adversary in character, this fact cannot impose upon any carrier or group of carriers any burden of proof. The designation of the Western Trunk lines by the Commission as complainants did not make them so, and did not purport to make them so, for the purpose of imposing upon them a burden with respect to the proof to be made. And if the expressed announcement of the Western Trunk lines that they wished a larger division of the rates involved, constituted ~~them~~ complainants to the extent of imposing any burden of proof upon them, the same thing must be true of appellants.

them

On pages 1 and 2 of the petition for rehearing, filed with the Commission by the Southwestern lines (Petitioners' Exhibit 6), appears the following language:

> "It is not a complaint case, where the Western Trunk lines have initially and openly complained of the divisions. However, the Commission has 'dubbed' the Western Trunk lines 'complainants' because it apparently had the idea that they were the aggressors, demanding greater division (Opinion, p. 458). The Southwestern lines also are contending for increased divisions from the Western Trunk lines and are as much complainants as are the Western Trunk lines, except that the Southwestern lines are more modest in their claims."

From the standpoint of demanding something, appellants were as much complainants before the Commission as the Western Trunk lines, and certainly had the same burden of proof to sustain.

Reverting to the quotations from the Commission's

first report, quoted in appellants' brief in connection with this argument, we submit that these quotations do not establish any incompleteness in the evidence. Such a fact, if it be a fact, should be capable of determination by a reference to the record, but no such reference is made by appellants.

The quotation from the Commission's report, and appearing at page 85 of the record, relates to system costs incurred by the respondents in handling all traffic. This is also true of the quotation said by appellants to appear at page 78 of the record, but which actually appears at page 83. The quotation from page 71 of the record relates to rate levels instead of density, as stated by appellants, and this is also true of the quotation from page 86 of the record. It thus appears that appellants' claim of incompleteness and unreliability in the record is based upon the Commission's failure to find a definite difference in the cost of handling the traffic involved in the two territories, and its inability to state the exact difference in rate levels in the two territories.

We have heretofore referred to the cost figures which were introduced in the record before the Commission. They were system figures, because, as stated by the Commission (R. 85, 105) costs applicable to the particular traffic under consideration could not be segregated. The system figures, however, were offered by both groups of carriers and covered several years. (Ex. A-38, R. 222; Ex. A-39, R. 228; Ex. A-51, R. 258; Ex. A-52, R. 262; Ex. A-53, R. 264; Ex. A-54, R. 266; Ex. A-78, A-79, A-80, R. 366; Ex. A-124, R. 512; Ex. A-241, R. 922).

These figures are, as stated by the Commission (R. 78), open to the objection that to some extent, they reflect the results of operation outside the two terri-

tories, but they constituted the best proof available. And in their petition for rehearing, filed after they knew of the proposed reduction in their divisions, the Southwestern lines made no offer to prove the costs incurred in handling the traffic under consideration, but contented themselves with criticizing the proof then in the record, part of which they had introduced (R. 105).

Under these circumstances the Commission cannot properly be criticized for failing to definitely state the costs incurred in handling the traffic involved. Nor was it required to do so. It was impossible for it to make a definite statement of the costs incurred in handling the traffic under consideration but, as is said in the opinion of the lower court (R. 1338), this circumstance should not deprive it of its jurisdiction and authority to act.

The same thing is true of the evidence with respect to rate levels. The rate levels in the two territories were fully proven in the record before the Commission (Ex. A-136, R. 581; Ex. A-186, R. 779; Ex. A-187, R. 780; Ex. A-188, R. 782; Ex. A-189, R. 783; Ex. A-190, R. 784; Ex. A-191, A-192, A-193, R. 788; Ex. A-194, A-195, R. 789; Ex. A-271, A-272, R. 1009; Ex. A-273, R. 1010; Ex. A-274, R. 1011). No one, from a consideration of the multitude of rates shown in these exhibits and applying on all manner of commodities in the two territories, could make a definite statement of just exactly how much higher or lower the Southwestern rates were by comparison with the Western Trunk line rates. It was a physical impossibility. What the Commission was required to do, and did do, is well stated in its first report, where it said (R. 85):

> "Obviously it is impossible to apply any mathematical formula which will operate with precision,

and it is necessary to be guided by general judgment after considering and weighing as well as we can the evidence before us."

This is an exactly correct statement of what it was necessary for the Commission to do and what it was supposed to do. It is for the purpose of doing this very thing that the Commission was brought into existence. It is supposed to have, and does have, an experience and knowledge enabling it to exercise better judgment with respect to these matters than courts or other commissions would have. It is not bound by strict rules of evidence, and there is a freedom and latitude in the proceedings before it consistent with the theory upon which it is supposed to and does function.

The Commission was not required to, and could not, produce definite statements such as appellants claim were necessary. The best proof available in the case, and which was offered before the Commission, was of such nature that it was not susceptible of reduction to definite figures. What the Commission was supposed to do, and did do, was to consider and weigh all the evidence and in the light thereof reach a conclusion as to what in its judgment was proper. Since this has been done, this court will not substitute its judgment for that of the Commission.

This, after all, is what appellants desire this court to do. They conclude their argument on this point by contending that upon the evidence before it the Commission should have done something else than it did do. They apparently desire this court to weigh the evidence before the Commission and decide that upon that evidence, the Commission should have reached a different conclusion. This, of coure, will not be done. *Assigned Car Cases, supra; Virginian Railway Company* v. *United States, supra; Interstate Commerce Commission* v. *Union Pacific R. R.*

Co., 222 U. S. 541; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad, supra; Western Chemical Company* v. *United States*, 271 U. S. 268, 270.

The decision of this court in *Allen* v. *St. L. I. M. & S. R. Co.*, 230 U. S. 553, has no application here. That was a suit in which an injunction was asked on the ground that certain rates prescribed by state authority were confiscatory, and it was, of course, held that definite and specific proof would have to be made by the plaintiff if the injunction was to be granted. This situation does not obtain in division cases before the Commission. In this case, there was introduced in the proceedings before the Commission the best evidence which could be produced. The fact that the Commission did not reduce its findings to definite figures does not make that proof incomplete or unreliable, nor does it put the Commission in the position of making conjectures.

VII.

THE EVIDENCE BEFORE THE COMMISSION FULLY SUPPORTS THE ORDER, AND NO ASSUMPTIONS WERE MADE BY IT NOT FOUNDED IN THE EVIDENCE. NOR DID IT CONSIDER ANY MATTERS ESSENTIAL TO A DISPOSITION OF THE CASE AND WHICH WERE NOT INTRODUCED IN EVIDENCE.

At pages 91 *et seq.* of their brief, appellants have argued that in certain respects the Commission's order is based upon assumptions not supported by the evidence before it and upon matters not introduced in evidence. All the points made by appellants are susceptible of complete answer. We will deal with these matters in the order in which they are made by appellants.

1. It is first argued that the Commission erred in requiring a division of the Southwestern rates on a rate

prorate basis, using percentages of the first class rates established in the *Consolidated Southwestern Cases*, 123 I. C. C. 203, since the scale of rates prescribed in that case was not in evidence before the Commission.

It is true that the Southwestern scale prescribed in the *Consolidated Southwestern Cases*, 123, I. C. C. 203, was not in the record before the Commission. The Southwestern scale which was in effect at the time of the hearings before the Commission, however, was introduced in evidence and is shown in line D of Exhibit A-195 (R. 789). The scale prescribed in 1927 is but a modification and extension of the scale introduced in the record. Whether or not the scale was in the record is unimportant, for appellants' argument is based upon a misunderstanding of what the Commission did. In its first report, after considering all the evidence, the Commission said (R. 86):

> "In our opinion the divisions in issue are not just, reasonable and equitable. Many of them are unjust to complainants and some of them are unjust to defendants. To cure their defects, they must be readjusted upon a consistent basis which will as nearly as practicable reflect, in the light of all the facts of record, the differing conditions in the two territories."

They then required the necessary readjustment to be made through the use of the Southwestern scale. It will thus be observed that the case had been decided before the Southwestern scale was brought into the picture. It was resorted to only for the purpose of producing a result already concluded upon. This definitely appears from the second report of the Commission. In their petition for a rehearing, the Southwestern lines urged the same objections to the use of the Southwestern scale as are now urged. The Commission said (R. 96):

> "This criticism rests upon a misunderstanding of what we did. Our formula was merely a method of

adjusting the divisions to what we believed, upon the evidence, to be a fair approximation of the difference in conditions in the two territories. The southwestern scale furnished a convenient means of doing this, using 100 per cent of the scale in the Southwest and 80 and 87.5 per cent in the two parts of western trunk-line territory. Another scale with a similar progression, such as the southeastern, could have been used with substantially the same results. The southwestern scale seemed more appropriate, since it forms the basis of the class rates and many of the commodity rates not only within the Southwest but between the two territories. * * * The southwestern scale was in evidence and the assumed scales were percentages thereof used merely as parts of the mechanism for dividing the joint rates in the proportions warranted by the facts of record."

It further said in its second report (R. 99):

"As has already been explained, our rate-prorate formula was adopted as a mechanism for dividing the joint rates in the proportions which we found justified by the facts of record. In our opinion it is an appropriate mechanism for that purpose."

The argument of appellants on this point raises a question as to what the Commission actually did, and on such a subject, the Commission's own statement would seem to be conclusive. The necessary conclusion is that the Commission did not prescribe a rate prorate of the divisions in issue, using ~~percentages of~~ percentages of the first class rates in the Southwestern scale.

There is a substantial difference between the use of the Southwestern scale for the purpose of determining the propriety of the divisions and its use as a mechanism for putting the Commission's decision into effect. As a matter of fact, the Southwestern scale, which is a rate scale, was incapable of use in determining the propriety of divisions. It has nothing to do with and does not relate to divisions. Because of this it could not have been used as evidence of facts which it was deemed necessary to

prove. And as a means of producing a proper division of revenue, the Commission was as free to use it as a mileage prorate or any other method of producing the results desired.

Nor were the Southwestern lines deprived of any rights through lack of opportunity to show that the divisions produced through the use of the Commission's formula were improper. They had been given every opportunity to present any evidence they wished to present with respect to the proper division of revenue, and the Commission was under no obligation to grant their petition for rehearing. *Virginian Railway Co.* v. *United States, supra*, p. 668. Whether the Southwestern scale was in the record or not, we submit that its use as a means of producing the division of revenue found proper by the Commission is not within the prohibition of the *Abilene & Southern Railway Co. Case, supra,* and does not invalidate the order.

2. It is next urged that the Commission did not have before it evidence showing the cost of operation, investment, etc. confined to those portions of respondent's lines which are located within the territories involved in the proceeding before the Commission. We have already referred to this matter in some detail. The Commission recognized the objections which could be urged to the use of system statistics, but they were the only figures available. They were put in evidence by both groups of railroads. Statistics based upon the operations of respondents in the two territories only, could not be produced (R. 83, 105). Nor were such figures offered to be produced in the petition for rehearing filed with the Commission by the Southwestern lines (R. 105).

The use of system figures was not condemned by the Commission in the cases cited in the note on page 96 of appellants' brief. In those cases, the Commission only

stated the objections which could be urged to the use of such figures, objections that we concede exist. As a matter of fact, the Western Trunk lines, in the proceedings before the Commission, made an effort to meet this objection of the Southwestern lines by segregating the statistics pertaining to those railroads which operated only in Southwestern and Western Trunk line territories. When this was done, the Southwestern lines urged that no consideration should be given to the figures because they did not include the results of operations by carriers having two lines outside the two territories. In its second report, the Commission said with respect to this subject (R. 105):

> "The Western Trunk lines did attempt such a segregation and we used the results, as shown above, as one of the checks upon our conclusions, but the Southwestern lines objected to these figures as not sufficiently representative."

If appellants' contentions with respect to this matter are correct, the Commission could never decide a divisions case, because no record could contain the necessary proof. We submit that the Commission cannot be deprived of its statutory jurisdiction because of the physical impossibility of producing such proof as appellants claim is necessary. The *Northern Pacific Railroad Company Case*, 268 U. S. 39, is not in point. This, as we have pointed out, was a suit in which an injunction was sought and in connection with which specific, concrete, definite evidence was required and could be produced.

3. Appellants further argue that the Commission considered other matters and statistics not introduced in evidence.

Their first point is that certain statistics of the Great Northern, Northern Pacific, Western Pacific and Union Pacific were considered, although these statistics were

not in the record. A reference to the Commission's second report (R. 106) will show that this is not so. The decision of the Commission with respect to these divisions had already been made when this second report was issued. The statistics in question were, of course, not in the record, but the report of the Commission shows that they were referred to only in connection with an allegation contained in the petition for rehearing that conditions in far western territory were much less favorable than in Western Trunk line territory. The Commission's decision in this case was not based upon these figures to any extent.

It is next urged that the Commission assumed that operating conditions were more favorable in Official and Missisippi Valley territories than in Western Trunk line territories, and the Commission's report is quoted from in order to prove the allegation (R. 83). Here again a reference to the Commission's report will show that this is not the case. No statement at all was made by the Commission with respect to operating conditions in the Mississippi Valley portion of Southern territory. With respect to the Wabash, the statement of the Commission is a generality. Obviously, it had nothing to do with the decision which was reached by it. It was not a matter to which it was necessary that any weight whatsoever be given in the determination of the case.

It is next urged that the Commission considered traffic densities for 1927, which were not in evidence. This again is not correct. A stipulation with respect to the use of these statistics was made upon the oral argument before the Commission. This stipulation appears at pages 1266 and 1267 of the record, and is as follows:

"Mr. Towner: We would have been glad to put in the 1927 figures but I was advised that they were not available.

"Commissioner Meyer: We will give considera-

tion to these suggestions. For the present, please, proceed with the argument.

Commissioner Eastman: Can the parties agree that the Commission can refer to reports on file filed by the various carriers up to date instead of depending on the old records?

Mr. Towner: As far as I am concerned I am willing to make that stipulation that the annual reports of all the lines may be referred to by the Commission for such information as it wishes to get from them.

Commissioner Meyer: Do you agree to that, Mr. Outlaw?

Mr. Outlaw: It places me in an embarrassing position. Of course when you refer to these matters often use is made of them and they are used in such a manner that, without explanation, they might be susceptible of different interpretations. When you can explain the use to be made of them and what interpretation is to be made of the statements, it is a different matter. Therefore I dislike to do it but as long as the Commission asks for it I will agree to that.

Commissioner Meyer: Such reference may be made to them?

Mr. Outlaw: Under the circumstances, yes."

It will be observed from the record that at the time this stipulation was made, the discussion before the Commission related to density only. An offer had been made by the Western Trunk lines to introduce the 1927 figures, which offer was objected to by the Southwestern lines. Thereupon, the stipulation was entered into. The Commission certainly assumed that any annual reports of the carriers, containing the density figures in question, could be referred to by it. On its first report it said:

> "At the argument it was stipulated that we might refer in the decision of the case to reports on file with us which had been received since the close of the hearings."

The use of these figures by the Commission was objected to by the Southwestern lines in their petition for

rehearing, and with respect thereto the Commission said (R. 101):

> "The data referred to are incorporated in special reports now secured annually by our Bureau of Statistics. We believe that the stipulation was broad enough to cover these reports. However, this evidence was merely corroborative of conclusions drawn from other evidence which is admittedly of record, and the 1927 showing was in no way essential to our findings. Moreover, there is no allegation in the petition that these 1927 figures were inaccurate."

Counsel for the Southwestern lines, when making the stipulation before the Commission, must have felt that he was agreeing to the use of density figures by the Commission, since that was the subject under discussion, yet appellants now contend that the stipulation only referred to those annual reports of the carriers, which contain no figures on density. Such a conclusion would seem to be rather absurd. Moreover, it will be observed that counsel for the Southwestern lines was agreeing with the Commission, and the request of the Commission was that it be permitted to refer to reports on file in order to get the density figures. No matter how this point is viewed, it seems clear that the Commission was justified in making use of the figures since they were contained in annual reports on file with them.

In connection with the argument of appellants that the Commission considered evidence not in the record, the *Abilene Southern Railway Company Case, supra,* is cited. In that case the order of the Commission rested in part upon data not in the record. The court referred to the fact that reports which were not in the record were used as evidence of facts which it was deemed necessary to prove and not as a means of verifying facts of which the Commission, like a court, takes judicial notice.

Even under this ruling, and upon the argument as it

is made by appellants, there is nothing improper in anything the Commission has done. The order of the Commission was in no sense based upon a consideration of the statistics of the Western Trunk lines, upon the operating conditions in Official territory, or upon the density reports for 1927. So far as the density reports are concerned, the Commission itself has said that they were only corroborative of conclusions drawn from other evidence admittedly of record, and were not essential to its findings.

VIII.

THE ORDER OF THE COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THERE WAS NO IRREGULARITY IN THE PROCEEDINGS BEFORE IT AND NO ERROR WAS MADE IN THE APPLICATION OF RULES OF LAW. ITS ORDER MUST, THEREFORE, BE SUSTAINED.

The record in this case is complete in every respect. It is much more complete than the record in the *New England Divisions Case, supra.* The best available evidence on every subject was introduced by both groups of carriers. While contending that the record is incomplete and otherwise defective, appellants have been unable to specify any insufficiency in it. They have contented themselves with making the allegation. That the conclusions of the Commission are supported by substantial evidence is apparent from the discussion of that evidence contained in the two reports of the Commission.

It is also certain that there was no irregularity in the proceedings. Due notice of hearings was given all parties. Five hearings were held and unlimited opportunity was given every party to introduce any evidence it thought necessary or desirable. Nor was any error made by the Commission in the application of rules of

law. Every contention made and every argument advanced by appellants is met and answered by decisions of this court.

Under these circumstances, the order of this Commission will be sustained by this court. *Assigned Car Cases, supra; Virginian Railway Co.* v. *United States, supra; Western Chemical Co.* v. *United States,* 271 U. S. 268; *Northern Pacific Ry. Co.* v. *Department, etc., supra; Interstate Commerce Commission* v. *Illinois Central R. Co.,* 215 U. S. 452; *Interstate Commerce Commission* v. *Union Pacific R. Co.,* 222 U. S. 541; *Interstate Commerce Commission* v. *Louisville, etc. R. Co., supra.*

With minor exceptions appellants' entire argument reaches the conclusion that the Commission erred in weighing the evidence before it, and that it should have decided the case in favor of the Southwestern lines. This argument was properly urged with persistency before the Commission, but having failed there, this court will not now substitute its judgment for that exercised by the Commission in the discharge of its statutory power. We submit that the decision of the lower court should be affirmed.

Respectfully submitted,

SILAS H. STRAWN,
P. F. GAULT,
K. F. BURGESS,
RALPH M. SHAW,
J. CARTER FORT,
G. M. SWANSTROM,
A. H. LOSSOW,
K. L. RICHMOND,
L. K. STRASSER,
FRANK H. TOWNER,
Solicitors for said Appellees.